

The Workers Compensation Appeals Board (Board) has considered the record as listed in the original Award of March 10, 1998. In addition, the Board has considered, per the agreement of the parties, the April 23, 2003 discovery deposition of claimant, the October 16, 2003 preliminary hearing transcript with attached exhibits, the October 30, 2003 evidentiary deposition of claimant, the December 22, 2003 deposition of Philip R. Mills, M.D., with attachments, and the December 15, 2003 deposition of Stephen L.

Reintjes, M.D., with attachments. In addition, the Board has considered the time and expenses, marked as Exhibit A to the Affidavit of claimant's attorney, Charles W. Hess, dated April 15, 2004.

### ISSUES

- (1) Is claimant entitled to post-award medical treatment?
- (2) Was the medical treatment provided claimant commencing on February 22, 2003, reasonable and necessary to cure or relieve claimant from the effects of the accidental injury he suffered on December 4, 1996?
- (3) Were the medical expenses associated with the treatment of claimant received commencing February 22, 2003, reasonable and necessary and should they be paid as authorized medical expenses?
- (4) Should claimant's attorney be awarded attorney fees and costs pursuant to K.S.A. 44-536(g)?

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Special Administrative Law Judge (Special ALJ) should be affirmed.

Claimant originally suffered accidental injury on December 4, 1996, when he slipped, injuring his back, right hip and right leg. As a result of those injuries, claimant came under the medical care of Philip R. Mills, M.D., receiving conservative treatment through August 4, 1997. Claimant was ultimately determined by the Board to be permanently totally disabled. This finding was affirmed by the Kansas Court of Appeals in its unpublished opinion in Docket No. 83,289, filed February 18, 2000. Claimant began receiving Social Security retirement after he turned 65 on November 19, 2000. Claimant occupied his time from August of 1997 through January 24, 2003, fishing, taking care of his property, doing light gardening in his vegetable garden and participating in activities with his two children, of whom he shares custody with his ex-wife.

On either January 24 or January 25, 2003, claimant transported a friend to Fort Scott, Kansas, in order for the friend to complete his income tax returns. Upon arriving at Fort Scott, claimant exited his car and, after taking approximately six steps, began experiencing extreme pain in his right leg and right hip. Claimant had occasionally experienced this same type of pain before, but, on that particular date, the pain was much more severe. By letter of February 14, 2003, claimant advised respondent's counsel of a

need for post-award medical treatment. On February 22, 2003, claimant's condition worsened to the point where he sought medical assistance at the emergency room of the Jane Phillips Medical Center in Bartlesville, Oklahoma. On February 26, 2003, claimant returned to the medical center and was referred to James W. Zeiders, M.D., an orthopedic surgeon. Claimant was first examined by Dr. Zeiders on February 27, 2003. An MRI was performed and, after that test, claimant was referred to M. R. Morenas, M.D., for a series of three epidural steroid injections. Claimant testified that the injections provided temporary relief, with claimant ultimately returning to the same level of pain he had experienced prior to the January 24 aggravation.

Claimant was referred to Jeffrey T. MacMillan, M.D., a physician in Overland Park, Kansas, on April 1, 2003, by respondent. Dr. MacMillan, after examining claimant, found claimant needed additional treatment and referred claimant back to Dr. Morenas for the third epidural steroid injection. Dr. MacMillan ultimately recommended claimant undergo surgery. By letter of June 9, 2003, respondent advised claimant that it was no longer voluntarily providing additional medical treatment. On August 21, 2003, claimant was reevaluated by Dr. Mills, who also recommended that claimant be evaluated by an orthopedic surgeon. Claimant was then sent to Stephen L. Reintjes, M.D., on November 24, 2003. Following the examination, Dr. Reintjes opined that claimant suffered from a right L4-5 disc herniation, with recommendations for repeat myelogram and follow-up CT scan as preludes to possible additional surgeries.

Claimant contends his ongoing symptoms are a direct and natural result of the December 4, 1996 accident with respondent. Respondent, on the other hand, contends that as claimant has gone for five and a half years, from August 4, 1997, to January of 2003, without medical care, claimant's condition is obviously the result of an intervening incident or injury, but not related to his December 4, 1996 accident with respondent.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup> When a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.<sup>2</sup> However, where the worsening or a new injury would have occurred absent the primary injury or where it is shown to have been produced by an independent intervening cause, it is not compensable.<sup>3</sup>

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<sup>1</sup> K.S.A. 1996 Supp. 44-501 and K.S.A. 1996 Supp. 44-508(g).

<sup>2</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

<sup>3</sup> *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

Two opinions were provided with regard to the cause of claimant's 2003 symptoms and how they relate to the December 4, 1996 accidental injury. Dr. Reintjes stated that claimant's right L4-5 disc herniation, which was present both in 1996 and displayed on the 2003 MRI, with the associated low back and right leg pain, was, in fact, related to the 1996 injury. However, the MRI also displayed a left L3-4 disc herniation, which Dr. Reintjes did not believe was related to claimant's original injury. It is significant that, at the time of the 2003 aggravation, claimant's symptoms included radicular pain to the right lateral calf and into the dorsum of his right foot, extending into the toes.

An opinion was also provided by Dr. Mills regarding claimant's ongoing symptoms. Dr. Mills stated that based upon the available information and to a reasonable degree of medical probability, claimant's condition appears to be a natural progression of the December 4, 1996 problem for which Dr. Mills originally provided medical care.

The Board has two opinions to consider, both of which indicate the current conditions are, in some way, related to the 1996 accident, with Dr. Reintjes excluding only the L3-4 condition, but finding the L4-5 condition to be a natural progression of claimant's original injury. The Board finds that claimant has carried his burden of proving that his ongoing condition in 2003 is a reasonable and natural consequence of the original December 4, 1996 injury, for which claimant would be entitled to ongoing medical care.

At the time of the post-award hearing, claimant presented medical bills totaling \$6,360.57, some of which had been paid, some of which remained due and owing. The Special ALJ determined that as claimant, under K.S.A. 2003 Supp. 510k, is entitled to post-award medical benefits for a work-related injury suffered while employed with respondent and as those benefits had been refused by respondent, claimant was entitled to reimbursement for the medical treatment which was provided at the Jane Phillips Medical Center in Bartlesville, Oklahoma. Neither Dr. Mills nor Dr. Reintjes opined that any of the medical treatment provided was, in any way, inappropriate. In fact, Dr. MacMillan, respondent's authorized doctor, returned claimant to Dr. Morenas for the final lumbar steroid injection. The Board finds that the medical care provided to claimant was reasonable and necessary under these circumstances, and the Order requiring respondent to reimburse claimant for the costs of that medical treatment is affirmed.

Finally, claimant's attorney submitted an affidavit, with attached time sheet showing time incurred totaling 51 hours at the requested rate of \$150 per hour totaling \$7,650. No objection was raised by respondent's attorney to the time listed nor to the hourly rate proposed. The Board, therefore, finds it appropriate and affirms the Special ALJ's award of \$7,650 in attorney fees.

Claimant's attorney also lists expenses in the amount of \$251.39, covering photocopying, long distance telephone calls, the obtaining of certain medical records from Dr. MacMillan and Dr. Zeiders, and travel expenses and postage.

While K.S.A. 44-536 makes no mention of expenses when discussing attorney fees, the Board notes that K.S.A. 2003 Supp. 44-510k(c) does allow for expenses, including, but not limited to, witness fees, mileage allowances, costs associated with the reproduction of documents that become a part of the hearing record, the expense of making a record of the hearings and such other charges that are, by statute, authorized to be taxed as costs. The Board, therefore, finds that the \$251.39 requested by claimant's attorney is appropriate and is awarded.

Finally, claimant notes in the expenses statement that the costs associated with the obtaining of Dr. Mills' evaluation in the amount of \$375 and the deposition of Dr. Mills in the amount of \$300 are not appropriate, citing the Board's earlier decision in *Thompson*.<sup>4</sup> The Board acknowledges that claimant's attorney does not agree with the earlier decision, but nevertheless understands the decision has been rendered. The attorney for claimant, in listing those amounts in the record, appears to desire that that issue remain for consideration upon appeal. The Board, therefore, in acknowledging that request, denies claimant's attorney's request for \$375 in evaluation cost and \$300 in deposition costs associated with obtaining the deposition opinion of Dr. Mills.

The Board, therefore, finds it appropriate that the Post-Award Medical Award of Special ALJ Jeff K. Cooper dated July 9, 2004, should be affirmed.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Post-Award Medical Award of Special Administrative Law Judge Jeff K. Cooper dated July 9, 2004, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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<sup>4</sup> *Thompson v. Hallmark Cards, Inc.*, Docket No. 244,719, 2003 WL 23172895 (Kan. WCAB Dec. 19, 2003).

Dated this \_\_\_\_ day of October 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Charles W. Hess, Attorney for Claimant  
Douglas C. Hobbs/Janell Jenkins Foster, Attorney for Respondent and its Insurance  
Carrier  
Jeff K. Cooper, Special Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director